NO. 84-95

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT DEPARTMENT OF PUBLIC UTILITY CONTROL OF THE STATE OF CONNECTICUT IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED FOR REVIEW

Congress provided, in the express language of the Communications Act of 1934, that jurisdiction over telecommunications be divided between the Federal Government and the States. The Federal Communications Commission was granted authority over interstate and international communications, 47 U.S.C. §151, while authority over the intrastate sphere was reserved to the States. 47 U.S.C. §§152(b), 221(b). Against this background, the questions presented by the National Association of Regulatory Utility Commissioners are as follows:

1. Whether the decision of the District of Columbia Circuit affirming the FCC's end user access charge plan is consistent with this Court's decision in *Smith v. Illinois Bell* governing the regulatory treatment of local telephone company-owned facilities used for both interstate and intrastate communications?

2. Whether the Court of Appeals for the District of Columbia Circuit erred in concluding that the Federal Communications Commission acted within its statutory authority under the Communications Act of 1934 in promulgating its end user access charge plan?

PARTIES

The parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit are listed in the Petition for a Writ Certiorari filed by the National Association of Regulatory Utility Commissioners.

The Department of Public Utility Control of the State of Connecticut is the state regulatory agency responsible for ensuring the establishment and operation of such communications services and facilities as may be in the interest of the residents of the State of Connecticut and the furnishing of such service at rates that are just and reasonable.

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The Department of Public Utility Control of the State of Connecticut submits this brief in support of the petition for a writ of certiorari filed by the National Association of Regulatory Utility Commissioners (NARUC).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth in NARUC Appendix A.

The Federal Communications Commission's access charge order is reported at 93 FCC2d 241 (1983). Its order on initial reconsideration is reported at 48 Fed. Reg. 42, 984 (1983). Its order on further reconsideration is reported at 49 Fed. Reg. 7, 810 (1984).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The decision of the Court of Appeals for the District of Columbia Circuit was entered on June 12, 1984. The petition for a writ of certiorari was filed by NARUC on July 18, 1984, within 90 days of the decision of the Court of Appeals. NARUC's petition was received by the Department of Public Utility Control of the State of Connecticut on July 23, 1984. This brief is filed within 20 days of that date.

STATUTES AND REGULATIONS

47 U.S.C. §151 is set forth in Appendix A. 47 U.S.C. §152(b) is set forth in NARUC Appendix B.

STATEMENT OF THE CASE

The Department of Public Utility Control adopts the statement of the case set forth in NARUC's petition.

SUMMARY OF THE ARGUMENT

The Federal Communications Commission, by its Access Charge Order, imposed a flat rate charge on telephone end users to recover the interstate portion of the costs associated with the local telephone loop. That charge is imposed on telephone subscribers regardless of whether any use is made of the interstate network and is a condition precedent to the receipt of basic, intrastate service. The access charge order violates the provisions of the Communications Act of 1934, §§47 U.S.C. 151 and 152(b).

1. The direct result of the access charge is to decrease the affordability of basic, intrastate telephone service to the vast majority of telephone customers. This result violates the FCC's primary mission under the Communications Act of 1934 to make basic telephone service available, "as far as possible, to all the people of the United States." 47 U.S.C. 151. The Court of Appeal's failure to review the FCC's administrative action in light of the agency's fundamental statutory directive constitutes serious error.

2. The access charge, imposed as a precondition to the receipt of basic, intrastate telephone service, violates the Congressional division of jurisdiction over the national communications network between the FCC and the States set forth in 47 U.S.C. 152(b). The Court's failure to properly assess Congress's reservation of authority over intrastate service to the States and the FCC's violation of that authority is contrary to the decisions of this Court.

REASONS FOR GRANTING THE WRIT

In recent years, the Federal Communications Commission (FCC) has been changing the way America makes and pays for its telephone service.[1] This process, joined with the breakup of AT&T,[2]

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[1]The FCC opened interstate telephone service to competition between AT&T and other common carriers (OCC's) *MTS & WATS Market Structure: Report & Third Supplemental Notice of Inquiry*, 81 FCC 2d 177, 183 (1980) (*Third Supplemental Notice*); detariffed customer premises equipment (CPE) preempting all state rate regulatory authority *In re Amendment of §64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* 77 FCC 2d 384 (1980) and removed the provision of enhanced telephone services from state supervision. *Memorandum Opinion and Order, In re Amendment of §64.702 (Second Computer Inquiry)* 84 FCC 2d 50 (1980).

[2]*United States v. American Telephone and Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982).

peaked with the FCC's decision to impose a flat-rate charge on all local telephone subscribers—the access charge—for their enjoyment of the opportunity to use the interstate telephone network. *MTS & WATS Market Structure: Third Report & Order*, 93 FCC 2d 241 (1983) (*Access Charge Order*).

While framed in terms of economic theory, cost causation and revenue collection, the access charge decision represents more than a mere restructuring of telephone rates and telephone service expense allocation. The charge represents a serious departure from the FCC's primary statutory mission under the Communications Act of 1934 "to make available, so far as possible, *to all the people of the United States*, a rapid, efficient, Nationwide . . . wire and radio communication service . . .". 47 U.S.C. 151 (emphasis supplied). With its access charge order—the culmination of a series of detariffing, deregulation and preemption decisions—the FCC has struck at the heart of the Communications Act.

A. *The Access Charge Order Impairs the Goal of Universal Service Mandated by the Communications Act of 1934.*

The nationwide telephone system—in service, costs and revenues—is divided between the interstate and intrastate jurisdictions. Between the two are the nontraffic sensitive costs (NTS) of the local loop connecting the subscriber to both networks. After *Smith v. Illinois Bell Telephone Company*, 282 U.S. 133 (1930) the interstate portion of the local NTS costs were apportioned to, and collected from, telephone customers on a per call basis as use was made of the interstate system. That arrangement looked to the totality of the local NTS plant in its cost and in its revenue recovery, recognizing the value to long distance service of an extensive local network as an outlet for interstate traffic. As customer contributions to the local system's interstate costs were on a usage basis, basic intrastate telephone service was made affordable and, thus, available, "so far as possible, to all the people of the United States . . ." 47 U.S.C. 151. The Court of Appeals recognized, albeit in a different

context, that cost recovery on a usage basis was a "neutral, reasonable principle" (*NARUC v. FCC*, No. 83-1225, slip op. at 80, NARUC Appendix at 80a) in the collection of NTS costs:[3]

> "(W)hen charges are grounded in relative use, a single rate can produce a wide variety of charges for a single service, depending on the amount of service used. Yet there is no discrimination among customers, since each pays equally according to the volume of service used.... Although OCC's will pay many more dollars per line for access charges, they require and use a correspondingly higher volume of exchange access on each line."

NARUC v. FCC, supra, slip op. at 80, NARUC Appendix A at 80a.

With its access charge order, however, the FCC moved away from its responsibility to increase the availability of basic telephone service to *all* the people of the United States. The access charge is to be imposed as a precondition to receipt of basic local service without regard to whether any use is made of the interstate network. As such, it will raise an entry barrier to the receipt of *any* telephone service. As the charge was designed, very specifically, to benefit only high-use interstate telephone customers, to the vast majority of present and would-be telephone users, the affordability of any telephone service is decreased. Lower per-minute interstate rates are not in the public interest when the cost of basic telephone service is prohibitive.

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[3]The Court of Appeals found that the "temporary" recovery of a portion of the local loop NTS costs from common carriers on a usage basis was proper because it promotes "economic efficiency". *NARUC v. FCC*, No. 83-1225, slip op. at 83 (D.C. Cir. June 12, 1984); NARUC Appendix A at 83a. The Court's sustaining the FCC's opposite conclusion in terms of end users stands the Communications Act on its head. The Act was adopted to make telephone service *available*, "as far as possible", to *all* people—not to make it as "economically efficient," as far as possible, and available only to some.

Generally speaking, the FCC has broad discretion to determine where the public interest lies. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). The agency's assessment of the public interest, however, must at least be founded upon the appropriate statutory standards.[4] *FCC v. Midwest Video*, 440 U.S. 689, 706-708 (1979). Although *Smith v. Illinois Bell, supra*, does not dictate the exact retention of the historical system of interstate cost collection, the Communications Act does require that any new approach promote, rather than impair, universal service. Even if a new direction can be achieved only by balancing competing considerations, the FCC's primary responsibility rests with increased basic service availability.[5] Cf. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual*, 103 S.Ct. 2856, 2873 (1983) In this case, however, the FCC did not act to increase the availability of basic telephone service, the FCC sacrificed it to "economic efficiency".[6]

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[4]In its *Memorandum Opinion and Order, MTS AND WATS Market Structure*, 48 Fed. Reg. 42, 984 (1983) (*Reconsideration Order*), the FCC explains the "driving force" behind its access charge decision. ¶¶ 7, 48 Fed. Reg. 42, 986. It is noteworthy that the FCC's statutory mandate to increase the affordability and availability of telephone service "to all the people of the United States" is not mentioned.

[5]The threat of uneconomic bypass was raised by the FCC and the Court of Appeals as a consideration virtually dictating the imposition of the end user access charge. That conclusion is erroneous. Residential customers do not have to pay an access charge to avoid the effects of uneconomic bypass. Other methods of effectively dealing with uneconomic bypass which would not impair the availability of basic telephone service were presented to the Commission. These, however, were rejected because they were not as "economically efficient" as the end user charge.

[6]Interestingly enough, the level of interstate costs on which the access charge is to be determined is not set on a nontraffic sensitive basis. Under the FCC's most recent NTS allocation decision 75% of the local NTS costs are assigned to the intrastate network and only 25% to the interstate—an approximation of the relative use between the two jurisdictions. *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 49 Fed. Reg. 7934 (1984). Under the end user access charge rationale—that cost causation does not depend on the number of calls

The FCC's only response to its primary statutory purpose was a belated attempt to mitigate the damage which the access charge will have on universal service. Instead of adopting a policy which would benefit basic telephone service, the FCC tacked onto its access charge a Universal Service Fund,[7] a transition plan to periodically raise the charge until it reaches full NTS cost recovery, a study and the possibility of life line waivers. *Memorandum Opinion and Order, MTS and WATS Market Structure* ¶¶5, 11-14, 48 *Fed. Reg.* 42, 984, 42, 986-987 (1984) (*Reconsideration Order*). The FCC's attempts to mitigate the damage occasioned by its access charge simply do not qualify as affirmative attempts to increase telephone availability as required by the Communications Act. If anything, such steps demonstrate that, in what the FCC has described as perhaps its "most important" decision concerning the future of the nation's telephone system[8], the agency has abandoned its primary statutory directive.

In this regard, the Court of Appeals review of the FCC action was wholly inadequate. The Court turned a blind eye to the deleterious impact of the access charge on the availability of basic telephone service. The Court reasoned that as the transitional plan to full cost recovery requires that only "some" of the NTS costs are to be recovered now, the FCC charge is valid because it will not immediately have a "substantial negative effect" on universal service.

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made—the NTS costs should be divided on a 50-50 basis. It would appear that with its transitional implementation plan and its current allocation scheme the FCC, at this point, is content to hide the full effect of "economic efficiency" from the public.

[7]Despite its name, the Universal Service Fund is not designed to promote universal service. It does nothing to reduce the deleterious impact of the access charge's recovery of all interstate NTS costs except where the end user charges in high cost areas *exceed, by several times,* the nationwide average charges. *Reconsideration Order, supra,* ¶¶11, 48 Fed. Reg. at 42, 987.

[8]*MTS & WATS Market Structure: Third Report and Order,* 93 F.C.C. 2d 241, 340-341 (1983).

NARUC v. FCC, supra, slip op. at 52, NARUC Appendix at 52a. The Court's rationale is erroneous for several reasons.

First, the Court in a different part of its decision admitted that the end user access charge is designed to eventually reach complete NTS cost recovery.[9] The fact that the access charge damage to universal service is designed to increase in intensity over time does not mean that the charge, in its initial stages, is consistent with the goals of the Communications Act. The Court's present failure to address the conflict between the access charge and universal service makes any future increase in that charge essentially unreviewable.

Second, the universal service provision of the Communications Act is not drafted in the negative. The FCC was created with the *affirmative* duty of increasing the availability of telephone service and the FCC's action should have been measured against that requirement. Cf. *American Textile Manufacturers Institute v. Donovan,* 452 U.S. 490, 508-514, 540-541 (1981). The Court's employment of a "no substantial negative effect" standard to review the FCC decision in this case contradicts the plain wording of 47 U.S.C. 151. The Court's failure to properly consider the basic purpose of the Communications Act as a directive for FCC administrative action constitutes serious error.

B. *The Access Charge Order Impermissibly Impairs Intrastate Telephone Service.*

Section 2(b) of the Communications Act of 1934 explicitly states that the Commission shall not have jurisdiction with respect to

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[9]In discussing the transitional nature of the collection of interstate NTS costs under the common carrier charge the Court noted:

> "The inside wiring and customer premises equipment costs will be gradually removed from the rate base, and the balance of NTS exchange costs not recovered from end users or through the Universal Service Fund will probably drop to zero." *NARUC v. FCC, supra,* slip op. at 73, NARUC Appendix at 73a.

"charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier." Under the access charge, however, receipt of basic, intrastate service is conditioned upon payment of interstate costs regardless of use of the interstate network. As the FCC has conditioned receipt of intrastate service on its access charge, it has seized jurisdiction over the provision of intrastate service, in violation of 47 U.S.C. 152(b).

The Court of Appeals in reviewing the impact of the access charge on intrastate service held that the FCC had jurisdiction to collect interstate charges in any manner that it chose. The Court relied upon its decision in *Computer and Communications Industry Association v. FCC*, 693 F2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2109 (1983) (*Computer II*), for the proposition that, under general preemption principles, the FCC has plenary authority over any aspect of the communications network which involves both interstate and intrastate service.

Such general principles, however, completely write §2(b) out of the Communications Act. The statutory limitation on FCC jurisdiction must have some meaning. Yet it has none if receipt of basic, intrastate service depends upon the fulfillment of FCC conditions precedent.

The Court of Appeals decision violates the principles set forth in this Court's decision in *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission*, 103 S.Ct. 1713 (1983). In that case this Court noted that the Atomic Energy Act of 1954 contained an express reservation of authority to the States to regulate the nuclear power industry "for purposes other than protection against radiation hazards." 42 U.S.C. §2021(k). Because of that reservation this Court held that a California statute conditioning certification of nuclear plants on the development of a demonstrated technology for the disposal for nuclear waste was not preempted by the authority of the Nuclear Regula-

tory Commission. The statutory reservation of authority to the States in 42 U.S.C. §2021(k) established a boundary line for judging a state's interference with the accomplishment and execution of the full purposes and objectives of Congress.

Similarly, a statutory reservation of authority to the States establishes a boundary line beyond which a federal regulatory agency cannot pass to accomplish the full purposes and objectives of Congress. This is so because a reservation of authority to the States establishes one of Congress's objectives.

In this case a reservation of State authority over intrastate telephone service is contained in §47 U.S.C. 152(b). Although collection of the interstate costs of the local loop may fall within the jurisdiction of the FCC, §47 U.S.C. 152(b) prohibits the FCC from conditioning the receipt of basic, intrastate service on such charges. The FCC's access charge decision plainly violates the division of regulatory authority between the Commission and the States set forth in the Communications Act of 1934.

> "The Court of Appeals is right, however, that the promotion of nuclear power is not to be accomplished 'at all costs.' The elaborate licensing and safety provisions and the continued preservation of state regulation in traditional areas belie that . . . . the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress."

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, supra, 103 S.Ct. 1713 at 1731-32.

CONCLUSION

For the reasons set forth herein, the Department of Public Utility Control of the State of Connecticut prays that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

The Department of
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APPENDIX TO THE BRIEF OF RESPONDENT DEPARTMENT OF PUBLIC UTILITY CONTROL OF THE STATE OF CONNECTICUT IN SUPPORT OF THE PETITION

APPENDIX A

47 U.S.C. §151. Purposes of chapter; Federal Communications Commission created.

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.